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IN THE

Supreme Court of the United States

ROBERT GRADY JOHNSON,
Petitioner,

v.

MIKE MULLIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Respondent presents only a tepid defense of the Tenth Circuit's decision. Instead, Respondent urges that the issues raised in the petition involve neither compelling federal questions nor misapplications of the Court's decisions. That is not the case.

A determination of whether a conviction should stand despite a due process violation is an important federal question. *See Chapman v. California*, 386 U.S. 18, 21 (1967) ("[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and

whether they have been denied"). Moreover, the Court has a compelling interest in protecting its authority and the precedential value of its decisions. In denying a writ of habeas corpus, the Tenth Circuit either misapplied or directly ignored two different decisions of the Court.

First, under the Tenth Circuit's holding, a state court can retroactively apply a new interpretation of a criminal statute even if (i) the interpretation is contrary to the statute's plain language and (ii) the interpretation is contrary to the state court's own prior decisions. The Tenth Circuit's decision flies directly in the face of this Court's admonition that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decisions has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). *See also Bouie v. City of Columbia*, 378 U.S. 347 (1964). In reaching its decision, the Tenth Circuit did not identify *Bouie* or *Lanier* as controlling.

Second, the Tenth Circuit paid only lip service to the principle that the right to cross examine a witness cannot be limited absent a legitimate, competing interest. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *see also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). Because the trial courts' conduct in both the instant case and *Chambers* was substantially similar, the Tenth Circuit's decision essentially renders the protection afforded by *Chambers* meaningless—no defendant in the Tenth Circuit will be able to obtain a writ of habeas corpus for a due process violation under *Chambers*.

Even Johnson's one challenge to the factual findings of the Tenth Circuit—that no rational jury could find beyond a reasonable doubt that Johnson was at the bank and participating in the robbery—has implications beyond this case. Respondent's central argument is that the Court should not consider the issue because it is for

the jury to evaluate witness credibility and weigh evidence. However, because the trial court expanded the scope of Oklahoma's felony murder statute, the jury did not decide whether Johnson was a participant in the robbery. Thus, Respondent and the Tenth Circuit are urging deference to jury findings where none have been made because of trial court error. Johnson respectfully urges the Court to grant a writ of certiorari to determine whether any rational jury would believe the testimony of an unconscious woman and a serial perjurer over the testimony of three eye witnesses, forensic evidence, and alibi testimony all demonstrating that Johnson was not, and could not have been, at the bank.

I. RESPONDENT IGNORES THE "IN THE COMMISSION OF" REQUIREMENT OF OKLAHOMA'S FELONY MURDER STATUTE.

Oklahoma's felony murder statute only applies when a murder occurs while the defendant is "in the commission of" a felony. Okla. Stat. tit. 21, § 701.7(B) (1981). In Opposition, Respondent simply ignores the long line of Oklahoma cases holding that the phrase "in the commission of" requires active participation in a felony at the time of the murder. Pet. 13-14. Moreover, Respondent fails to cite a single case where the felony murder statute has been applied to someone not actively participating in the underlying felony.

Instead, Respondent argues that the felony murder statute can still apply to Johnson if combined with Oklahoma's principals statute. Okla. Stat. tit. 21, § 172 (1981). However, Respondent also does not identify a single case where the principals statute has been used to expand the felony murder statute to apply to a person not actively present at, and participating in, the underlying felony. All of the cases cited by Respondent upheld convictions where the defendant actively

participated in a felony during its commission. *See Lewis v. State*, 451 P.2d 399 (Okla. Crim. App. 1967) (getaway driver and lookout); *Chaney v. Brown*, 730 F.2d 1334 (10th Cir. 1984) (actively participated in kidnapping); *Oxdeine v. State*, 350 P.2d 606, 611 (Okla. Crim. App. 1960) (actively participated in the robbery); *State v. Jones*, 859 P.2d 514 (Okla. Crim. App. 1993) (actively participated in the robbery); *Hatch v State*, 662 P.2d 1377 (Okla. Crim App. 1983) (defendant planned the robbery and was also at the scene of the crime in the getaway car as a lookout).

Without any case law to support its argument, Respondent instead asserts that Johnson has merely presented a new factual situation to which the principals statute will now apply. Br. in Opp. 16 (citing *Lanier*, 520 U.S. at 261). However, the facts of the case are not unique and the principals statute is not new. Until Johnson's case, the Oklahoma Court of Criminal Appeals ("OCCA") has consistently required that a defendant be actively engaged in the commission of a felony for the felony murder statute to apply even under the principals statute. *See Anderson v. State*, 91 P.2d 794, 797 (Okla. Crim. App. 1939) (providing a loaded pistol prior to the crime did not "aid or abet or assist the [killer] at the time of the actual killing").

The reason is simple. The phrase "in the commission of" presents a unique temporal element to the felony murder statute.[1] The OCCA has consistently defined "in the commission of" to mean performing an act essential

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[1] Respondent argues that because the principals statute has been combined with the malice murder statute, it can also be combined with the felony murder statute. However, the malice murder statute does not contain the "in the commission of" requirement. Okla. Stat. Tit. 21 § 701.7 (1981). It is that provision that requires active participation at the time of the underlying felony.

to the commission of the crime "[a]t the time of the killing." *Franks v. State*, 636 P.2d 361, 365 (Okla. Crim. App. 1981); *see also Stiles v. State*, 829 P.2d 984, 991 (Okla. Crim. App. 1992) ("[a] person is in the commission of" when he is "performing an act which is an inseparable part of the" crime). The principals statute does not, on its face, vitiate the "in the commission of" element of the offense. While the OCCA may be free to redefine the phrase through the principals statute, it may not do so retroactively.[2] In this case, the OCCA's retroactive redefinition of the statute was particularly unforeseeable because the court's new interpretation directly conflicted with its prior decisions. Thus, Johnson could not have been on notice that the felony murder statute applied to someone who did not actively participate in the commission of a felony at the same time as the murder. In fact, Johnson remains the only person in Oklahoma's history to be convicted of felony murder without having actively participated in the underlying felony.

Finally, Respondent's argument that Johnson did more than help Mr. Neill purchase a gun prior to the robbery is a red herring. The record conclusively demonstrates that while Mr. Neill was robbing the bank, Johnson was sitting in his apartment 16 miles away. As such, Johnson cannot be found guilty of felony murder under the statute in effect at the time of the robbery based on conduct prior to the robbery. The Tenth

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[2] Respondent quotes *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) for the proposition that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas." *Id.* However, *Bradshaw* further recognizes that criminal statutes may not be interpreted in a way that would constitute "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* While a state court may interpret its own statutes, it may not do so in such a way as to retroactively expand a statute.

Circuit's decision to the contrary violates Johnson's right to due process and conflicts with the Court's decision in *Bouie*.

II. RESPONDENT ERRS IN CLAIMING THAT A RATIONAL JURY COULD HAVE FOUND THAT JOHNSON ACTIVELY PARTICIPATED IN THE ROBBERY.

Respondent essentially reiterates the same points raised by the Tenth Circuit in arguing the sufficiency of the evidence. Respondent's arguments are already addressed in detail in the Petition. Pet. 17-23. However, three points merit further attention.

First, Respondent credits Marilyn Roach's testimony that she heard the voices of two robbers, citing testimony by Dr. Ingalls that Ms. Roach *could* have heard a conversation despite being *unconscious* and having her hearing impaired by a *bullet*. Br. in Opp. 23. However, lying next to Ms. Roach were two witnesses who did not lose consciousness and testified that (i) there was no conversation between two robbers, (ii) the only conversation during the robbery was between themselves, and (iii) they (along with Ms. Roach) only saw one robber. To believe Ms. Roach is to believe that the other survivors lied on the stand. To disbelieve Ms. Roach is to believe, as the FBI did, that she hallucinated while unconscious. No rational jury could credit Ms. Roach's testimony over the testimony of two unbiased (and conscious) witnesses.

Second, Respondent urges that the prosecutor's opinion that one person could not have stabbed the three bank workers to death by himself is based on evidence, not speculation. Br. in Opp. 23. While the nature and number of stab wounds is certainly evidence, the claim that one of the bank employees would have tried to run unless there was a second robber is pure speculation

(speculation contradicted by the fact that none of the survivors, each of whom saw only one robber, tried to run when Mr. Neill attempted to execute them). Such speculation is legally insufficient to support a conviction. *State v. Williams*, 630 P.2d 694, 701-02 (Kan. 1981) (rejecting as legally insufficient the prosecutor's supposition that because the decedent's body was found without defensive marks there must have been an accomplice).

Finally, Respondent's main point on the sufficiency of the evidence argument is that the credibility of Ms. Roach and Mr. Williams, the serial perjurer, was for the jury to decide. Br. in Opp. 23-25, 28. However, in this case, we do not know if the jury credited their testimony since the jury did not decide whether Johnson was at the bank. Thus, it is for the Court to decide whether any rational jury could find Johnson guilty beyond a reasonable doubt based on the testimony of an unconscious woman or a serial perjurer despite eye witness testimony, forensic evidence, and alibi testimony[3] demonstrating Johnson was not at the bank.

III. RESPONDENT FAILS TO DISTINGUISH JOHNSON'S CASE FROM THE COURT'S DECISION IN *CHAMBERS*.

Respondent does not dispute that the trial court erred when it limited Johnson's right to cross examine Debbie Ward, the prosecutor's witness, regarding the time Johnson left her apartment on the day of the robbery. Br. in Opp. 30. Therefore, a writ of habeas corpus should be granted if the evidence excluded on cross examination "'might have affected the trial outcome.'" Pet. App. 30a (quoting *Patton v. Mullin*, 425 F.3d 788, 797 (10th Cir. 2005)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637

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[3] Johnson's alibi witness, Ms. Ward, is addressed in detail in Section III.

(1993) (conviction must be overturned if excluded evidence would have "substantially influenced" the jury).

Respondent also does not dispute that there is no evidence in the record that Johnson could have made it to the bank in 13 minutes, the amount of time Johnson had under the excluded testimony. Pet. 25-26. However, Respondent argues that even under the excluded testimony a conviction was still possible. Respondent is wrong.

First, Respondent claims that, despite Ms. Ward's testimony, the jury could have believed that Johnson actually had approximately 25 minutes to reach the bank. Br. in Opp. 33 (citing the testimony of Mr. Howard, Ms. Ward's boyfriend, that he left Ms. Ward's apartment around 12:50 p.m. on the day of the robbery). As noted in the petition, Mr. Howard actually testified that (i) he was only guessing and did not remember when he left the apartment, (ii) time stamped records prove Johnson and Ms. Ward were still at the apartment until at least 12:54 p.m., and (iii) when Mr. Howard left the apartment *Johnson was still on the phone.* Pet. 21. Thus, Mr. Howard's testimony does not impact Johnson's alibi window.[4]

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[4] Respondent also makes a half hearted defense of the Tenth Circuit's factual findings with regards to Ms. Ward's alibi in Section II of the Opposition. Br. in Opp. 26-27. Respondent does not raise any new issues and its arguments are sufficiently addressed in the Petition at pages 21-22. However, while acknowledging that the Tenth Circuit wrongly claimed that the route from the apartment to the bank could be driven in 12 minutes, Respondent mentions that an FBI agent drove a *different* route, from a *different* location, in a *different* car, "for *approximately* the same distance" in 14 minutes while speeding. Br. in Opp. 28 (emphasis added). Given that (i) the agent was not doing a timed run, (ii) was guessing at how long it took him to drive the route, (iii) was guessing at the distance from the apartment complex to the bank, (iv) was guessing at the distance

Second, Respondent argues that even though Johnson is relying on time stamped records, the clocks *might* have been a little off and there could have been enough time for Johnson to have made it to the bank. Of course, Respondent does not use the record to make this argument, instead urging the Court to accept the maxim that anything is possible. Johnson urges the Court to rely on the record—the times were not in dispute at trial. However, even assuming that Johnson had slightly more than 13 minutes, he still could not have reached the bank in time. An expert driving a faster vehicle to the point of recklessness could only drive the route in 17 minutes. Pet. 26. And, in addition to driving the route, Johnson would also have needed time to go back to his apartment, put on shoes, walk down to the car he shared with Mr. Neill (which was already at the bank), park the car, greet the tellers, and have the tellers pull Mr. Neill's file. Pet. 21.

Third, Respondent argues that under the new interpretation of the felony murder statute, Johnson could have been found guilty of felony murder even if he was not at the bank during the robbery. This issue has already been addressed. *See* pp 3-5, *infra*. However, even under the new interpretation of felony murder, Johnson's presence at the bank was still the dominant issue at trial. The prosecutor continually argued that Johnson was at the bank in order to link him directly to the murders. Obviously, a jury would be far more likely to convict if they knew it was possible that Johnson directly aided and assented to the murder of four people. For that reason, even applying the new interpretation of felony murder, it was clear constitutional error to deny

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from his location to the bank, and (v) there was no evidence that the different routes could have been driven in the same amount of time, Respondent's point is apropos of nothing. (C.A. App. IX at 2768-69)

cross examination regarding evidence tending to prove Johnson was not at the bank. Pet. 28-29.

Fourth, attempting to distinguish *Chambers*, Respondent asserts that Johnson was not injured by the trial court's error because "it was apparent to the jury" that Ms. Ward had previously testified differently regarding the time Johnson left her apartment. Of course, Respondent's speculation as to what was "apparent" to the jury is irrelevant. There is no substitute for full cross examination. *See Harper v. Kelly*, 916 F.2d 54, 57 (2d Cir. 1990) (error in precluding cross-examination was not harmless despite opportunity to argue the point in summation). At most, the jury's general awareness of other testimony simply serves to undermine Ms. Ward's credibility. Because of the trial court's erroneous ruling, Johnson was not only unable to test Ms. Ward's recollection, but Ms. Ward did not have the opportunity to adopt her earlier testimony. *Chambers*, 410 U.S. at 295 (cross examination goes beyond mere argument, allowing a defendant to "test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience"). Because of the trial court's error, the jury was left believing it was possible for Johnson to have been at the bank in time to participate in the robbery.

Both *Chambers* and Johnson involved limitations of cross examination regarding prior sworn statements demonstrating that the defendants could not have committed the crimes with which they were charged. Pet. 29-30. If *Chambers* continues to be considered good law, it must apply in the present case.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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